United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7001-09-15

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 75-7001, 75-7009, 75-7015

JOHN E. BAKER and GERALDINE S. GEORGE,
Plaintiffs-Appellees,

vs.

REGIONAL HIGH SCHOOL DISTRICT NO. 5, REGIONAL BOARD OF EDUCATION OF REGIONAL HIGH SCHOOL DISTRICT NO. 5, HENRY W. BENEDICT, JAMES BERRY, SIDNEY SVIRSKY, and JEAN HANNA,
Defendants-Appellants,

MARION P. CROCCO, GEORGE P. DAVIS, JR., JEAN VIRSHUP, LOUIS KUTZNER, JEAN S. MIDDLETON, FREDERICK STEIGERT, MRS. FRANK GRUSKAY, HERBERT HERSHENSON, LEONARD LOHNE, DOUGLAS J. SMITH, FREDERICK ROSS and MARJORIE B. WAHNQUIST,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOINT BRIEF OF THE DEFENDANTS-APPELLANTS HENRY W. BENEDICT, SIDNEY V. SVIRSKY, JAMES BERRY AND JEAN HANNA

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PRELIMINARY STATEMENT

On November 22, 1974 the Honorable Jon O. Newman rendered his Memorandum of Decision in this matter.

Thereafter, on January 3, 1975 judgment in accordance with the aforesaid Memorandum was entered in favor of the plaintiffs. The Memorandum has not been reported, but is set forth fully in the Joint Appendix at Page 50a-66a.

STATEMENT OF THE ISSUES

PART A

1. Did the Court below err in applying the principle of Summary Judgment, Federal Rules of Civil Procedure, Rule 56, to the issues raised herein?

PART B

2. Did the Court below err in extending the rule of *Wesberry* v. *Sanders* through *Hadley* v. *Junior College District of Metropolitan Kansas City* to Amity Regional District Number 5?

STATEMENT OF THE CASE

(A) The Proceedings Below

These defendants see no purpose to be served by setting forth an additional Statement of the Proceedings in the United States District Court for Connecticut, at New Haven. Therefore, the Statement of the "Proceedings Below" set out in the Brief of the Defendant-Appellants District No. 5 and the Regional Board is adopted as if incorporated herein.

(B) Statement of the Facts

Again it is believed to be in the best interests of the parties that surplussage is not needed. Therefore, these defendants adopt the Statement of the Facts of the Defendant-Appellants District No. 5 and the Regional Board in full as if the same had been fully set forth herein.

In addition it should be noted, and these defendants submit, that it was agreed by counsel for the plaintiffs, that upon the denial of the Motions to Intervene as a defendant filed by the Town of Woodbridge and the Town of Bethany, that any defenses available to those municipal defendants would likewise be available to their respective Treasurers and Town Clerks.

(C) Statement of Intent by These Defendant-Appellants

It is believed and, therefore, espoused, that the issues raised in this case should be heard with all possible dispatch. Dispatch, coupled with concern for the Constitutional questions involved, the litigants, the municipalities, the residents, and most importantly, the future educational functions for the multitude of school children involved. With this in mind, it is the intention of these Defendant-Appellants, the Treasurers and Town Clerks of the Towns of Woodbridge and Bethany, to combine their efforts and submit one Joint Brief setting forth their arguments.

With the consent and indulgence of the Court the Defendant-Appellants, Henry W. Benedict and Sidney V. Svirsky, shall set forth their argument in Part A and the Defendant-Appellants, James Berry and Jean Hanna, shall do likewise in Part B.

ARGUMENT

PART A

1. The Court Below Erred in Applying Federal Rules of Civil Procedure, Rule 56, to the Issues Raised in This Case.

Rule 56 states in Part:

> 56(a) A party seeking to recover upon a claim . . . or to obtain a declaratory judgment may, at anytime after the expiration of 20 days from the commencement of the action . . . move with or without supporting affidavits for a summary judgment in his favor upon all or part thereof.
>
> (c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> (e) . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

This is the rule which plaintiffs sought to be applied to this case, and which in fact Judge Newman did apply. In their motion for summary judgment plaintiffs included three affidavits; the Treasurer of the Town of Orange; the Registrar of Voters of the Town of Orange and the Superintendent of Schools for the Town of Orange, together with extracts of the minutes of the three member towns at or

near the time of creation of Regional District No. 5. In addition plaintiffs requested the Court to take judicial notice of such matters of general knowledge as it might (App.p.17a).

Upon the occasion of argument, June 12, 1974, the plaintiffs and all defendants filed briefs (App.p.2a), asserting bona fide questions of fact. The Regional School District also submittted an Affidavit (App.p.33a).

It is submitted that the exercise of the summary judgment process should be performed with great care and concern for the matter at hand. In this case the matter at hand was not only the applicability of one man one vote to Regional District No. 5, but the effect of such a ruling on the fifteen other Regional Districts in Connecticut (App. facing 40a). These districts involve 44 towns, and approximately 159,490 people, 27,188 students, and 134 board members (App. facing 40a, and 41a).

For these towns and people it is fair to say that this is a case which involves a large public issue, and one which dictates caution in the exercise of the fact finding power of the court.

Affidavit of Douglas J. Smith (App.p.33a, et seq.) specifically states with regard to the plaintiffs' contention as to how the board operates;

> "The description is not factually accurate in describing how the board operates." (App.p.34a)

For the next five and one-half pages (App.p.35a-40a) Mr. Smith sets forth in Affidavit form how the Board in fact operates. Much of the information contained therein is in fact in contradiction to the assertions of the plaintiffs in their brief. Sound practice would appear to dictate that summary judgments should not be awarded on the basis of briefs, especially where a Counter-Affidavit is filed con-

trasting the validity of the movant's claims. See *Season-All Indus., Inc.* v. *Turkiye Sise Ve Cam Fabrikalar;* A.S., (C.A.3d-1970) 425 F2 34.

Because of the very nature of this action, and the fact that it would declare a nullity the agreement of the legislative bodies of these three towns and their 26,100 residents and their 3,411 Regional District School pupils (App.p.facing 40a) it is submitted that the issue was deserving of closer scrutiny than afforded by the summary judgment process.

The Supreme Court of the United States took a position alongside that urged by these defendants in the 1947 case of *Kennedy* v. *Silas Mason Co.,* 334 U.S. 249 (1947). In that case petitioners, who worked in government-owned plants under a cost-plus-fixed fee contract with the War Department, sought overtime compensation from the respondents. The respondents' summary judgment was granted. In reversing and remanding the case, Mr. Justice Jackson speaking for the court said:

> "The short of the matter is that we have an extremely important question, probably affecting all cost-plus-fixed fee war contractors and many of their employees immediately, and ultimately affecting by a vast sum the cost of fighting the war. No conclusion in such a case should prudently be rested on an indefinite factual foundation. . . .
>
> But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this court should draw inferences with caution from complicated courses of legislation, contracting and practice.
>
> We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. . . .

> We remand the case to the District Court for reconsideration and amplification of the record in the light of this opinion and of present contentions.

Kennedy v. *Silas Mason Co.*, supra at 256, 257.

In the case of *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1970) the District Court granted respondents' motion for summary judgment and petitioner appealed. In a *Per Curiam* decision the Supreme Court stated that . . . the existence of conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could be construed as a distinction under the 1964 Civil Rights Act which required that persons of like qualifications be given employment opportunities irrespective of their sex. Id, at 544.

The Court went on to say that the record before it was inadequate for resolution of that important issue, and cited *Kennedy*. The Court stated at Page 544:

> "Summary Judgment was therefore improper and we remand for fuller development of the record and for further consideration."

The *Kennedy* case arose during the war years, and certainly the issues raised were important considerations with regard to the prosecution of the war effort. In fact, Justice Jackson referred to this. Even confronted with the time of emergency the Supreme Court concluded that sound judicial practice required a more thorough evaluation of the facts. *Phillips* reaches the same conclusion. A desire to terminate litigation and free up the Court should not supplant sound judicial procedure. Our Supreme Court believes that the better practice is to establish a firm foundation on which to build a lasting decision, rather than to provide a temporary shelter on sand.

Rule 56 provides an extraordinary method of disposition of litigation. Issues are either disposed of, or refined for

trial purposes. However, the text writers and our Courts have consistently counseled that the Courts exercise caution and discretion in the application of the Rule. Moore, *Federal Practice And Procedure,* 17.10

The defendants contend that there is a two pronged question presented here, viz:

> (1) *Hadley* v. *Junior College District of Metropolitan Kansas City,* 397 U.S. 50 (1970) states, in effect, that whenever a local government decides to select persons by popular election to perform governmental functions, that the Equal Protection Clause of the Fourteenth Amendment requires that the rule of one-man-one-vote applies, now therefore does the Amity Regional School District No. 5 actually perform governmental functions within the scope of *Hadley?*
>
> and
>
> (2) Is the means of nomination and election of Regional School Board Members a popular election within the scope of *Hadley?*

This two pronged issue is really what was before the trial court, and what is now placed before this court for review. It is submitted that the Affidavits and Briefs of all the parties and oral arguments made it quite clear that there was a genuine issue of material fact in this case which should have been tried.

In the Affidavit of Douglas J. Smith, Superintendent of Regional High School District No. 5, the position taken by the plaintiffs is directly opposed and put in issue. Within the Affidavit Mr. Smith states:

> "In my opinion, based on my experience as Assistant Superintendent, Acting Superintendent, and Superintendent of Regional High School District No. 5, the district meeting, together with the referendum process provided for approval of bond issues, effec-

> tively govern the programs and activities of Regional High School District No. 5, leaving the Regional Board of Education to administer those programs and activities." (App.p.39a)

It is not intended that this Court or the trial court should adopt this contention of Mr. Smih as a found fact. However, it is submitted that it does present a legitimate, bona fide question that a dispute as to a material fact does exist, and this is the function of the trial court on a Summary Judgment motion, to determine if there is . . . ."a genuine issue as to any material fact . . ." See Federal Rules of Civil Procedure, Rule 56, Subsection (c).

These defendants sought below to bring this to the Court's attention, and urged that a means other than Summary Judgment be employed. In their brief below Henry W. Benedict and Sidney V. Svirsky, in addition to opposing Summary Judgment as the tool of decision making, submitted a Proposed Schedule of Proceeding.

"All the parties hereto agree that this is an issue of first impression in this State, and that it is an issue which dictates cautious expedition. Therefore, with full knowledge of the rights of the named parties, the involvement of the thousands of unnamed electors of the member towns, and with specific attention to the quality of the education offered to children involved, the following schedule of proceedings is respectfully submitted.

> (1) An evidentiary hearing for the submission of proof on the question of the functions and activities of the Regional High School District No. 5 to be held within ten (10) days.
>
> (2) As an alternative to item 1 above an agreed Stipulation of Facts setting forth the functions and activities of Regional High School District No. 5 to be completed and filed within twenty (20) days.

(3) In the event of the exercise of item 2, there shall be the completion of Discovery necessary within fifteen (15) days.

(4) Regardless of which avenue of factual information is agreed upon, item 1 or item 2, an agreed Stipulation on the Law that applies, to wit, *Hadley* v. *The Junior College District of Metropolitan Kansas City, Missouri, et al,* 397 U.S. 50 (1970), the cases cited therein, and its progeny. Such stipulation on the Law to be filed in accordance with the time schedule set out in item 1, or item 2 whichever is agreed upon.

(5) Preparation for filing with this Honorable Court of an alternative plan of membership and representation on the Regional High School District No. 5 Board of Education, in the event such an eventuality becomes, or appears reasonable following the exercise of item 1, or item 2 above. Such Plan to be filed within ten (10) days from the date of the filing of the Judgment of this Honorable Court on the issues raised in items 1-4 of this schedule."

In the *Hadley* case there was a stipulation and statement of the case under Rule 82.13 of the Missouri governing statutes. See *Hadley* v. *Junior College,* 432 SW2 328, at 330.

In *Avery* v. *Midland County Commissioners,* 390 U.S. 474 (1968) there was an evidential hearing which concluded that the County Commissioners Court was the general governing body of the county, and was representative of most of the general governing bodies of American cities, counties, towns and villages. See Note 6 in *Hadley* v. *Junior College,* 397 U.S. 50 and *Hadley* at 432 SW2 332.

In *Rosenthal* v. *Board of Education,* 385 F. Supp. 223 (1974) a three judge court was convened to consider the constitutional questions involved, at the direction of this Honorable Court of Appeals. See *Rosenthal* v. *Board of*

Education, 497 F.2 726. In the 1974 *Per Curiam* decision of the Court in *Rosenthal* the actions of the Court of Appeals is referred to at Page 225 as follows:

> "However, as the Court of Appeals observed, the method of selection is neither classically appointive nor elective, and exploration is necessary to determine whether the result more closely resembles a *Sailors* or a *Hadley* board."

It is respectfully submitted that the Regional School District No. 5 Board is somewhere in there too, between *Sailors* and *Hadley*. The *Rosenthal* rationale, supra, should be followed, or we will never really know.

CONCLUSION

The Defendant-Appellants submit that the Town Meeting form of government in Bethany, Woodbridge and Orange is a unique creature. It is as close as one can come to direct democracy and really is one man one vote. It is at these Meetings that board members are nominated and through the actions of the Town Meeting the members are designated. The issue is whether that action is appointive, legislative or elective. Only through a fact finding process can this be determined. That is what the defendants seek, and sound judicial process requires nothing less.

Respectfully submitted,

GERALD P. DWYER,
Attorney for Defendant-Appellants
Henry W. Benedict and
Sidney V. Svirsky

ARGUMENT

PART B

2. The Court below erred in applying *Hadley V. Junior College District of Metropolitan Kansas City* to Board of Education of Amity Regional District No. 5 because its membership is not elected by individual ballot.

It is the contention of the Appellants that the Legislature of the State of Connecticut, by its enactment of the enabling legislation, Part III of Chapter 164, Connecticut General Statutes, Brief of Regional Board, did not make a decision "to have citizens participate individually by ballot" in the selection of members to serve on the Board of Regional District Schools. Therefore, the extension of the *Wesberry* v. *Sanders*, 376 US 1, rule to this case is in error because it does not fall into that group of cases described by Justice Black in *Hadley* v. *Junior College District*, 397 US 50 at Page 54:

> "While particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions.:

He says again on Page 55:

> ". . . We think the decision of the State to select that official by popular vote is a strong indication that the choice is an important one."

And the specific holding is on Page 56:

> "We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of

> the Fourteenth Amendment requires that each qualified vote must be given an equal opportunity to participate in that election. . . ."

The rule extends to those cases in which the decision has been made in the enabling legislation "to have citizens participate individually by ballot." *Hadley* does not deal with the situation in which the decision made is to utilize the Town Meeting as the legislative body of the Town for the selection of Regional District Board Members.

All Three (3) Towns in Regional District No. 5 follow the procedure prescribed in Section 10-46(b), *Connecticut General Statutes, 1958 Revision, as amended,* as made specially applicable to Regional District No. 5 in Special Act No. 74-69 of the 1974 Connecticut General Assembly:

> "Notwithstanding the provisions of Section 10-46 of the General Statutes, with respect to the election of members of regional boards of education, each town in regional high school district number five shall elect one member each year at the annual town meeting held for the purpose, to serve for a term of three years to commence on the first day of July following such election."

Section 10-46(c) provides an alternative method of selection under the provisions of Title 9 of the Connecticut General Statutes, entitled "Elections" and prescribing political party nominations subject to primary, vote by machine, polling places and their management, etc.

Section 10-46(a), *Connecticut General Statutes, 1958 Revision, as amended,* provides in part as follows:

> "The first members of such regional board of education shall be nominated and elected at a meeting of the legislative body of each town held within thirty days after the referendum creating the district. . . . Thereafter, members of the board shall be nominated

> and elected in their respective towns in accordance with subsection (b) or (c) of this section as determined by the legislative body of each town."

The town of Woodbridge in its Charter, adopted under the Home Rule Act of the State of Connecticut in 1960, provides:

> "Section 8-16, Regional School Board. So long as the Town shall participate in Regional High School District Number 5, the Town shall appoint members to the Regional Board of Education thereof as follows: (a) Pursuant to Section 10-46 of the General Statutes, the Town Meeting shall, at each annual meeting thereof, nominate and appoint one member of such board.
>
> (b) Not less than sixty days before the annual meeting of the Town Meeting, the Board of Selectmen shall appoint a nominating committee to make one or more nominations for membership on such Regional Board. No more than one-half of the members of such nominating committee shall be of the same political party. Not less than twenty days before the annual meeting, such committee shall report to the Board of Selectmen the names of persons nominated by it, and such names shall be included by it in the warning of the annual meeting. Nominations may also be made from the floor. Whether or not otherwise required by law, the principal of the minority representation provisions of Section 9-167a of the General Statutes shall be applied to the nomination and appointment of the Town's representatives on such Regional Board."

It Cannot be said that the selection method used in Regional District Number 5 is "popular election" as that expression is used in *Hadley,* supra. On the other hand, the procedure which might have been used, except for the option exercised by Charter and fixed by Special Act No. 74-69, supra, is a "popular election" governed by all of the

safeguards of Title 9, supra. In one case, the selection is made by vote in the Town Meeting as a legislative body. In the other case, the selection is by individual ballot during voting hours with absentee ballot provisions under Title 9, supra.

The decision of the legislature of the State of Connecticut was to create a Regional District Meeting with the attributes of the Town Meetings of the constituent Towns including the eligibility to vote in such meeting; and, further, to create a Regional Board of Education, the chairman of which is given the attributes of a Board of Selectmen, with the ultimate power in the Regional District Meeting. See Section 10-47, Brief of District 5.

It is not a consolidation of three school districts into one but the transfer of responsibility for administration of grades 7-12 under the general supervision and control of the state board of education; (See Section 10-46a, Brief of District 5), to have the powers and duties conferred upon boards of education by the general statutes (See Section 10-47, Brief of District 5). As such, there is no requirement that it be elective nor that no choice between elective and appointive be allowed.

The Town Meeting in the general law of the State of Connecticut and under the provisions of the Charter of the Town of Woodbridge is a deliberative body. See Addendum to Brief of Defendants-Appellants District No. 5, Section 7-1-7-9d, Connecticut General Statutes. The meeting is conducted in accordance with rules of order administered by a moderator selected by the meeting. Rules of order may be adopted by ordinance. The relevant portions of the Charter of the Town of Woodbridge follow:

> "Section 3-1. The Town Meeting. There shall be a Town Meeting of the Town, the members of which shall be electors of the Town and all others entitled to vote at a Town Meeting (other than a Town election) pursuant to the General Statutes."

> "Section 3-3. Conduct of the Town Meeting. (e). The Town Meeting, at a meeting duly warned thereof, may by resolution adopt, amend, or repeal procedures for the orderly and efficient conduct of the Town Meeting. It shall establish a committee to review and recommend such procedures. (f) Such other committees of the Town Meeting may be appointed for such purposes and with such responsibilities as shall be authorized by the Town Meeting. . . ."

The analogy of the Regional District Meeting to the Town Meeting made by the legislature in Section 10-47, supra, indicates the intention to fashion a system which cannot be reconciled with the line of cases cited in Hadley, supra.

This inference is reinforced by a review of the referendum provisions of the enabling legislation which are obviously not designed to accord equal weight to each vote cast in a referendum. Referring again to the Addendum in the Brief of Defendants-Appellants Regional District No. 5, the following statutes provide for unequal voting in referenda:

> Section 10-45—to establish a regional school district there must be an affirmative vote by a majority of the votes cast in each town.
>
> Section 10-47a—to amend the plans under which the region was organized the majority vote in each town of the district must be in favor of the amended plan.
> Section 10-63c—the vote upon the withdrawal of a member town or the dissolution of the district must be an affirmative vote in each member town.

The unequal voting provisions in the referenda cited above have the rational purpose of preserving the independence of each of the member towns by affording to each of them a veto power over the change in any established

plan by a simple majority vote of the district as a whole. This is, in a sense, a protection of the original contract or compact among Three (3) townships against a change of mind by merely a simple majority of the voters in the district as a whole.

It is submitted that *Hadley,* supra, stands for the extension of the rule stated in the *Wesberry* v. *Sanders* to those situations cited therein, but does not apply to the situation existing in Regional District No. 5.

Respectfully submitted,

WILLIAM J. COUSINS,
Attorney for Defendants-Appellants
James Berry and Jean Hanna

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Defendants-Appellants,
Marion P. Crocco, George P. Davis, Jr.,
Jean Virshup, Louis Kutzner, etc.
Defendants.

Affidavit of Service by Mail

STATE OF NEW YORK
COUNTY OF New York } ss.:

Robert J. McElroy , being duly sworn, deposes and says:

I am over the age of twenty-one years and reside at 32 Gramercy Park South , in the Borough of Manhattan , City of New York. On the 5th day of March , 1975 , at 4:00 o'clock pm ,

I served 2 copies of the Joint Brief of the Defendants Appellants Henry W. Benedict, Sidney V. Svirsky, etc.

in the above-entitled action on: each of the following parties:

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the attorney for the

in the said action, by depositing said copies, securely wrapped, properly addressed, and postage fully prepaid, in a post office box regularly maintained by the U. S. Government in the post office at 90 Church Street, in the Borough of Manhattan, City of New York.

Robert J. McElroy

Sworn to before me this 5th day of March , 1975

Michael J. Hoops

MICHAEL J. HOOPS
Notary Public, State of New York
No. 30-4503056
Qualified in Nassau County
Commission Expires March 30, 1975